

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SCOTT C. SMITH,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF CORRECTIONS,

Defendant.

CASE NO. 11-5080RJB/KLS

ORDER ON REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge Karen L. Strombom. Dkt. 13. The Court has considered the Report and Recommendation, objections, if any, and the record herein.

The Report and Recommendation contains the fact and procedural history of this case (Dkt. 13, at 1-2) and is adopted here by reference. The first issue addressed in the Report and Recommendation is Defendant Washington State Department of Corrections' ("DOC") Motion to Dismiss (Dkt. 9). Dkt. 13. Rather than file a response to the Motion to Dismiss, Plaintiff filed an Amended Complaint without seeking leave of Court or the agreement of the opposing party.

Dkt. 10. The second issue addressed in the Report and Recommendation, then, is whether leave should be granted for Plaintiff to file an Amended Complaint. Dkt. 10. The Report and Recommendation recommends dismissing the claim in the Complaint against DOC, and granting Plaintiff leave to amend.

The Report and Recommendation's recommendation, that Plaintiff's claim against DOC should be dismissed, should be adopted for the following reason. Plaintiff's only claim in the original Complaint is a 42 U.S.C. § 1983 claim for damages against the DOC. Dkt. 1. Plaintiff's § 1983 claim is not a valid federal claim because "a state is not a 'person' against whom a § 1983 claim for damages might be asserted." *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 617 (2002)(holding that although no § 1983 claim could be maintained against Georgia, the state law claims could proceed because Georgia waived sovereign immunity by removing the action)(citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)). Plaintiff's claim against DOC should be dismissed.

To the extent that Plaintiff intended to move to amend his Complaint when he filed his Amended Complaint, the Report and Recommendation should be adopted and his motion to amend should be granted. It appears Plaintiff intends to amend his complaint by naming individual defendants. Dkt. 10. Plaintiff should be permitted to amend his Complaint, and use the pleading entitled Amended Complaint (Dkt. 10) as his Amended Complaint. Plaintiff is reminded, however, that he is expected to follow the Federal and Local Rules of Civil Procedure.

It is **ORDERED** that:

- The Report and Recommendation (Dkt. 13) is **ADOPTED**,
- Plaintiff's claim against DOC is **DISMISSED**,
- Plaintiff's motion for leave to amend the Complaint is **GRANTED**,

- The pleading entitled Amended Complaint (Dkt. 10) supersedes the original Complaint.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 11th day of April, 2011.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN
United States District Judge